

1 William M. Audet (CA State Bar #117456)  
2 [waudet@audetlaw.com](mailto:waudet@audetlaw.com)

3 Aaron H. Darsky (CA State Bar #212229)  
4 [adarsky@audetlaw.com](mailto:adarsky@audetlaw.com)

5 Adel A. Nadji (CA State Bar #232599)  
6 [anadji@audetlaw.com](mailto:anadji@audetlaw.com)

7 Audet & Partners LLP  
8 221 Main Street, Suite 1460  
9 San Francisco CA 94105  
10 Telephone: 415.982.1776  
11 Facsimile: 415.568.2556

12 *Attorneys for Plaintiffs  
13 and the Proposed Class  
14 [Additional Counsel on Signature page]*

15 **UNITED STATES DISTRICT COURT**  
16  
17 **NORTHERN DISTRICT OF CALIFORNIA**  
18  
19 **SAN FRANCISCO DIVISION**

20 JAMES NOREM, on behalf of himself and ) Civil Action No. CV-09-00956-PJH  
21 others similarly situated, ) Civil Action No. CV-09-00961-PJH  
22 Plaintiff, ) Civil Action No. CV-09-00960-PJH  
23 ) Civil Action No. CV-09-00962-PJH

24 v. ) And related cases:  
25 ) Civil Action No. CV-09-00002-PJH

NETFLIX, INC. and WALMART.COM ) Civil Action No. CV-09-00096-PJH  
26 USA, LLC, ) Civil Action No. CV-09-00111-PJH  
27 Defendants. ) Civil Action No. CV-09-00116-PJH

OSCAR MACIAS, on behalf of himself ) Civil Action No. CV-09-00180-PJH  
28 and others similarly situated, ) Civil Action No. CV-09-00225-PJH  
29 Plaintiff, ) Civil Action No. CV-09-00236-PJH

v. ) Civil Action No. CV-09-00244-PJH  
30 ) Civil Action No. CV-09-00274-PJH

NETFLIX, INC. and WALMART.COM ) Civil Action No. CV-09-00340-PJH  
31 USA, LLC, ) Civil Action No. CV-09-00349-PJH  
32 Defendants. ) Civil Action No. CV-09-00361-PJH

33 ) Civil Action No. CV-09-00368-PJH  
34 ) Civil Action No. CV-09-00375-PJH  
35 ) Civil Action No. CV-09-00377-PJH

1 JIM CORNETT, on behalf of himself and  
2 others similarly situated,

3 Plaintiff,

4 v.  
5 NETFLIX, INC. and WALMART.COM  
6 USA, LLC,

7 Defendants.  
8

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9 JESSE RANDLE, on behalf of himself and  
10 others similarly situated,

11 Plaintiff,

12 v.  
13 NETFLIX, INC. and WALMART.COM  
14 USA, LLC,

15 Defendants.  
16

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) Civil Action No. CV-09-00378-PJH  
)) Civil Action No. CV-09-00391-PJH  
)) Civil Action No. CV-09-00398-PJH  
)) Civil Action No. CV-09-00399-PJH  
)) Civil Action No. CV-09-00400-PJH  
)) Civil Action No. CV-09-00402-PJH  
)) Civil Action No. CV-09-00434-PJH  
)) Civil Action No. CV-09-00445-PJH  
)) Civil Action No. CV-09-00447-PJH  
)) Civil Action No. CV-09-00496-PJH  
)) Civil Action No. CV-09-00553-PJH  
)) Civil Action No. CV-09-00554-PJH  
)) Civil Action No. CV-09-00678-PJH  
)) Civil Action No. CV-09-00962-PJH

**NOTICE OF MOTION, MOTION,  
AND MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF MOTION TO REMAND**

**Date: May 13, 2009**

**Time: 9:00 a.m.**

**Location: Courtroom 5, 17<sup>th</sup> Fl.**

**Hon. Phyllis J. Hamilton**

## **NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

4 PLEASE TAKE NOTICE THAT, on May 13, 2009 at 9:00 a.m., or as soon  
5 thereafter as counsel may be heard, Plaintiffs James Norem, Oscar Macias, Jim Cornett,  
6 and Jesse Randall, on behalf of themselves and others similarly situated, by and through  
7 counsel, will move and hereby do move, the Court pursuant to 28 U.S.C. § 1447(c) for  
8 remand of the above entitled, related actions back to the Superior Court of California, in  
9 and for the County of Santa Clara.

The grounds for this motion, as more fully set forth in the accompanying memorandum of points and authorities, are that Plaintiff pleaded a valid state-law class action against Defendants and, because diversity is lacking even under the Class Action Fairness Act, removal is improper.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

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1           **I. INTRODUCTION**

2           Plaintiffs brought these actions on behalf of themselves and others similarly  
3 situated, specifically, those subscribers in California of Defendant Netflix, Inc.'s  
4 ("Netflix") online DVD rental service who paid supra-competitive prices for the service  
5 as a result of the Unlawful Market Division Agreement made between Netflix and  
6 Defendant Walmart.com, LLC's ("Walmart.com"), against Netflix and Walmart.com  
7 (collectively "Defendants"). Plaintiffs seek to represent a class of California plaintiffs  
8 who were harmed and seek relief under California law. Defendant Walmart.com has  
9 wrongfully removed this action to the U.S. District Court for the Northern District of  
10 California despite a lack of federal jurisdiction. Plaintiffs now move to have these three  
11 cases remanded to the Superior Court of California in and for the County of Santa Clara  
12 from which they were improperly removed.

13           **II. BACKGROUND**

14           On January 28, 2009, Plaintiff James Norem on behalf of himself and a proposed  
15 class of similarly situated subscribers in California to Defendant Netflix, online DVD  
16 rental service brought this action in the Superior Court of California in and for the  
17 County of Santa Clara against Netflix and Defendant Walmart.com. Plaintiff alleges four  
18 causes of action including violations of California Business and Professions Code §§  
19 16720 and 16727 ("Cartwright Act"), violation of California Business and Professions  
20 Code § 17200 ("Unfair Competition Act"), and unjust enrichment (against Defendant  
21 Netflix only).<sup>1</sup> All of Plaintiff's claims arise under California state law and are based on  
22 an unlawful agreement made between Defendants to divide the market for sales and  
23

24  
25  
26  
27  
28           

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<sup>1</sup> The complaints filed by Plaintiffs Jim Cornett, Oscar Macias, and Jesse Randle assert the exact same  
causes of action.

1 online rentals of DVDs which had the effect of allowing Defendants to charge supra-  
2 competitive prices for their respective services in the absence of meaningful competition.  
3

4 On March 4, 2009, Defendant Walmart.com removed this action from California  
5 Superior Court to the U.S. District Court for the Northern District of California, alleging  
6 federal diversity jurisdiction under 28 U.S.C. §§ 1332(d) and 1453. **As this is a class**  
7 **comprised entirely of California citizens against California citizen Defendants**  
8 **asserting California state law claims, Plaintiff opposes federal jurisdiction and now**  
9 **brings this Motion to Remand.**

10 **III. LEGAL STANDARD**

11 Walmart.com removed this action to this Court asserting diversity jurisdiction  
12 under 28 U.S.C. §§ 1332(d) and 1453. Traditionally, in order to remove an action to  
13 federal court under its diversity jurisdiction, there had to be total diversity between the  
14 parties, i.e., no defendant could be a citizen of the same state as any plaintiff. This  
15 standard was somewhat relaxed for class actions by the Class Action Fairness Act of  
16 2005 (“CAFA”). Section 1332(d)(2) provides, in relevant part, that:

17 The district courts shall have original jurisdiction of any civil  
18 action in which the matter in controversy exceeds the sum or value of  
19 \$5,000,000, exclusive of interest and costs, and is a class action in which –

20 (A) any member of a class of plaintiffs is a citizen of a State  
21 different from any defendant;

22 (B) any member of a class of plaintiffs is a foreign state or citizen  
23 or subject of a foreign state and any defendant is a citizen of a State; or

24 (C) any member of a class of plaintiffs is a citizen of a State and  
any defendant is a foreign state or a citizen or subject of a foreign state.

25 This relaxed standard under CAFA has been termed “minimal diversity” and thus serves  
26 to create federal jurisdiction for class actions where the amount in controversy exceeds  
27 \$5 million, unless all plaintiffs and defendants are citizens of the same state.  
28

1       While the diversity standard is indeed relaxed under CAFA, it has not completely  
2 abolished the requirement that defendants who wish to remove an action to federal court  
3 prove there is federal jurisdiction. Because the federal courts are courts of limited  
4 jurisdiction and may only hear such cases and controversies as they are authorized by the  
5 Constitution and federal statute.

7       It is the defendant seeking removal who bears the burden of proof that sufficient  
8 subject matter jurisdiction exists to allow a case to be heard in federal court. Even under  
9 CAFA's relaxed standard "the burden of establishing removal jurisdiction remains, as  
10 before, on the proponent of federal jurisdiction." *Abrego v. Dow Chem. Co.*, 443 F.3d  
11 676, 685 (9<sup>th</sup> Cir. 2006). In *Abrego*, the 9<sup>th</sup> Circuit held that:

13       The traditional rule of burden allocation in determining removal  
14 jurisdiction was meant to comport with what the Supreme Court has  
15 termed 'the dominant note in the successive enactments of Congress  
16 relating to diversity jurisdiction,' that is, 'jealous restriction, of avoiding  
17 offense to state sensitiveness, and of relieving the federal courts of the  
overwhelming burden of 'business that intrinsically belongs to the state  
courts' in order to keep them free for their distinctive federal business."

18       *Id.* (quoting *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, 62 S. Ct. 15, 86 L. Ed. 47  
19 (1941)). Thus in order to assert removal jurisdiction, even under CAFA, Walmart.com  
20 must prove that jurisdiction exists. To allow Walmart.com to simply assert that there is  
21 minimal diversity and proceed with federal jurisdiction would turn a "relaxed standard"  
22 into no standard at all.

24       Removal jurisdiction is strictly construed, and immediate determination of  
25 jurisdiction is generally appropriate. Given the potential prejudice to Plaintiffs if their  
26 case is improperly removed to federal court, this Court may assess subject matter  
27

1 jurisdiction, *sua sponte*, at any stage in the proceedings. *See Allstate Ins. Co. v. Hughes*,  
2 358 F.3d 1089, 1093 (9<sup>th</sup> Cir. 2004). Indeed, the federal removal statutes mandate:

3 (4)The United States district court in which such notice is  
4 filed shall examine the notice promptly. If it clearly  
5 appears on the face of the notice and any exhibits annexed  
thereto that removal should not be permitted, the court shall  
make an order for summary remand.

6 (5) If the United States district court does not order the  
7 summary remand of such prosecution, it shall order an  
evidentiary hearing to be held promptly the prosecution of  
8 justice shall be permitted, it shall so notify the State court  
in which prosecution is pending, which shall proceed no  
9 further.

10 28 U.S.C. § 1446(c)(4) and (5) (2009).

11 **IV. ARGUMENT**

12 Walmart.com's removal of this action was improper. The United States District  
13 Court for the Northern District of California lacks subject matter jurisdiction because  
14 there is no federal question jurisdiction and there is insufficient diversity between the  
15 parties to confer diversity jurisdiction, even under the relaxed "minimal diversity"  
16 standard of CAFA. Both defendants are citizens of California, the representative  
17 plaintiffs are citizens of California, and the proposed class includes only those citizens of  
18 California harmed by Defendants' unlawful activities. The federal statutes providing for  
19 removal of properly filed state causes of action, including CAFA, are to be strictly  
20 construed with all doubt resolved in favor of remanding a case to state court. This  
21 entirely intrastate, "local question" class action was properly filed in the Superior Court  
22 of California in and for the County of Santa Clara. Walmart.com has failed to establish  
23 diversity between the parties. Accordingly, this case should be remanded to the Superior  
24 Court of California for further proceedings.

1                   **A.        REMOVAL STATUTES ARE TO BE STRICTLY**  
2                   **CONSTRUED**

3                   It is well settled that the federal statutes providing for removal of actions properly  
4                   filed in state court are to be strictly construed with all doubts resolved in favor of remand  
5                   to the state court. The Ninth Circuit has held that the language of the removal statutes  
6                   “evidence the Congressional purpose to restrict the jurisdiction of the federal courts on  
7                   removal” and the policy “regulating the jurisdiction of federal courts is one calling for the  
8                   strict construction of such legislation.” *Hoyt v. Sears, Roebuck & Co.*, 130 F.2d 636, 637  
9                   (9<sup>th</sup> Cir. 1942) (internal quotations omitted). Further, the Court in *Hoyt* held that “[d]ue  
10                  regard for the rightful independence of state governments, which should actuate federal  
11                  courts, requires that they scrupulously confine their own jurisdiction to the precise limits  
12                  which the statute has defined.” *Id.*

13                  An action is removable only if the federal court would have had original  
14                  jurisdiction if the action had been brought in federal court in the first instance. 28 U.S.C.  
15                  § 1441(a); *Plute v. Roadway Package Systems, Inc.*, 141 F.Supp.2d 1005, 1007 (N.D.  
16                  Cal. 2001); *United Policyholders v. Provident Life and Accident Insurance Company*,  
17                  1999 U.S. Dist. LEXIS 18546, \*2 (N.D. Cal. 1999); *Caterpillar, Inc. v. Williams*, 482  
18                  U.S. 386 (1987).

19                  Defendants bear the burden to establish that this Court may exercise diversity  
20                  jurisdiction upon removal. *Bellecci v. GTE Sprint Communications Corporation*, 2003  
21                  U.S. Dist. LEXIS 640, \*8 (N.D. Cal. 2003); *Plute v. Roadway Package System, Inc.*, 141  
22                  F.Supp.2d 1005, 1007 (N.D. Cal. 2001) (the removal statute is strictly construed against  
23                  removal jurisdiction and any doubt is resolved in favor of remand); *Gaus v. Miles, Inc.*,  
24                  980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be rejected if there is any

1 doubt as to the right of removal. . . ."); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d  
2 1062, 1064 (9th Cir. 1979) ("we look to federal law to determine whether the elements of  
3 removal jurisdiction have been established under the statutes, keeping in mind that  
4 removal statutes are strictly construed against removal"). *McNutt v. General Motors*  
5 *Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Sullivan v. First Affiliated Secur., Inc.*, 813  
6 F.2d 1368, 1371 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) ("the burden of establishing  
7 jurisdiction falls on the party invoking the removal statutes"). In this case, Walmart.com  
8 fails to carry their burden of establishing that diversity jurisdiction exists.  
9

10 The Ninth Circuit has continued to recognize that removal statutes must be strictly  
11 construed even after the enactment of CAFA. In *Abrego, supra*, the Ninth Circuit,  
12 quoting the Supreme Court and using the same language from *Hoyt*, stated "not only does  
13 the language of the Act of 1887 evidence the Congressional purpose to restrict the  
14 jurisdiction of the federal courts on removal, but the policy of the successive acts of  
15 Congress regulating the jurisdiction of federal courts is one calling for the strict  
16 construction of such legislation." *Abrego*, 443 F.3d at 685 (quoting *Shamrock Oil & Gas*  
17 *Corp. v. Sheets*, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)). As stated  
18 above, *Abrego* was a case interpreting removal jurisdiction under CAFA, thus it can be  
19 inferred that even in the face of the relaxed "minimal diversity" standard, the Court is still  
20 required to narrowly construe the statute when examining removal jurisdiction. The  
21 Court went on to recognize "[t]he strong presumption against removal jurisdiction means  
22 that the defendant always has the burden of establishing that removal is proper." *Abrego*,  
23 443 F.3d at 685 (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992)) (internal  
24 quotations omitted).  
25  
26  
27  
28

**B. THIS COURT LACKS SUBJECT MATTER JURISDICTION UNDER CAFA BECAUSE WALMART.COM HAS NOT SHOWN MINIMAL DIVERSITY**

Walmart.com has failed to show that even minimal diversity exists between the class and Defendants. Walmart.com’s central argument in their notice of removal is that because Plaintiffs used the phrase “residents of California” rather than “citizens of California” in their complaint that automatically means that there will be non-citizens of California included in Plaintiffs’ proposed class. Moreover, Walmart.com asserts that that manufactured, hypothetical “extra-California” potential class member automatically confers federal jurisdiction on this action under CAFA.

This strained reading of the complaint is clearly at odds with Plaintiffs' obvious intent to confine this to an entirely intrastate action involving only those citizens of California harmed by Defendants' unlawful activities. By relying on such a hyper-technical argument, Walmart.com completely ignores the clear policy of strictly construing removal statutes in an attempt to cram a case with absolutely no implications outside of the state into federal court. This is exactly the sort action that is best left to state court as it is an entirely state matter. More importantly, Walmart.com has not satisfied its burden to prove that there is diversity between the proposed class and the Defendants.

Walmart.com's notice of removal also fails to recognize § 1332(d)(4), which provides that “[a] district court shall decline to exercise jurisdiction...over a class action in which...greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed...” 28 U.S.C. § 1332(d)(4). Because Walmart.com's removal relies on the technical distinction

1 between Plaintiff's use of "resident" versus "citizen" of California, the burden is on  
2 Walmart.com to show that even greater than one-third of California residents who used  
3 the Netflix service during the relevant period were not also California citizens. Clearly,  
4 Walmart.com will be unable to do so. In their notice of removal, Walmart.com cited only  
5 two possible examples of individuals who *might* be California residents but not California  
6 citizens: foreign nationals residing in California and college students from out of state in  
7 California for school. It is somewhat absurd for Walmart.com to suggest that more than  
8 one-third of a class of California residents would be foreign nationals and college  
9 students. Accordingly, even if the use of the word "resident" versus "citizen" is enough  
10 to suggest that CAFA's removal jurisdiction applies, the burden is still on Walmart.com  
11 to show that more than one-third of a class of California residents would not also be  
12 California citizens.

i. **Both Defendants Are Citizens of California**

17 Defendant Walmart.com LLC is an LLC organized in California with its principal  
18 place of business in Brisbane, California. Defendant Walmart.com has conceded to being  
19 a citizen of California. (Not. of Removal ¶ 7.) More importantly, under CAFA an  
20 unincorporated association, such as a limited liability company, is a “citizen of the State  
21 where it has its principal place of business and the State under whose laws it is  
22 organized.” 28 U.S.C. § 1332(d)(10). Accordingly, Defendant Walmart.com LLC is a  
23 citizen of California.  
24

25 Defendant Netflix, Inc. is a corporation incorporated under the laws of Delaware  
26 and maintains its principal place of business in Los Gatos, Santa Clara County,  
27 California. Thus Defendant Netflix is also a citizen of both Delaware and California.

ii. **The Proposed Class Is Comprised Entirely of Citizens of California**

Despite Walmart.com’s parade of horribles argument that the class will inevitably include non-California members and thus invoke removal jurisdiction, the proposed class is comprised entirely of citizens of California. While the phrasing “residents of California” is arguably ambiguous when compared to the more precise “citizens of California,” it was Plaintiffs’ clear intent that this class action be confined only to California citizens. Moreover, numerous cases considering remand under the same or similar circumstances, where a Plaintiff uses the word “resident” instead of “citizen,” including the case cited by Defendant, *Baldwin v. Monier Lifetile, LLC*, 2005 U.S. Dist. LEXIS 31983 (D. Ariz. December 7, 2005), have found remand to state court proper because the federal court lacked subject matter jurisdiction.

In *Baldwin*, the plaintiffs brought a class action complaint in Arizona state court against a Delaware-organized limited liability company in a complaint that defined a class of property “owners” in Arizona but failed to define them as “citizens of Arizona.” The district court held that “[a]llegations of residency but not citizenship are insufficient to determine the existence of diversity jurisdiction.” *Id.* at \*7. However, the court ultimately found that that “insufficiency” in the plaintiffs’ complaint did not amount to the level of proof defendants were required to show in order to establish minimal diversity for the purposes of CAFA and remanded the case to Arizona state court.

In *Castaneda v. Costco Wholesale Corp.*, 2009 U.S. Dist. LEXIS 3595 (C.D. Cal. January 9, 2009), the Central District of California held that remand to the Superior Court of California was proper in a case where plaintiffs failed to use the word “citizen” and

1 instead framed their proposed class as “[a]ll persons employed by [Defendant] in any  
2 California non-exempt membership warehouse position...” *Id.* at \*3. The court held that  
3 “[w]here the initial pleading does not disclose the citizenship of each party and the  
4 amount-in-controversy, the case is not removable unless the defendant can prove these  
5 jurisdictional facts.” *Id.* at \*2 (citing *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689,  
6 695 (9<sup>th</sup> Cir. 2005)).

8 In *Anderson v. Bank of America*, 2006 U.S. Dist. LEXIS 20098 (N.D. Cal. April  
9 5, 2006), this Court also held that remand to state court was proper in an proposed class  
10 action where plaintiffs used the phrase “California residents” instead of “citizens.” The  
11 Court held that “[t]he removal statute is to be strictly construed against removal and any  
12 doubt is resolved in favor of remand.” *Id.* at \*5 (citing *Duncan v. Stuetzle*, 76 F.3d 1480,  
13 1485 (9<sup>th</sup> Cir. 1996)). The Court also held that “[t]he burden of establishing jurisdiction  
14 rests with the party effecting removal.” *Anderson*, 2006 U.S. Dist. LEXIS 20098, at \*5  
15 (citing *Gaus*, 980 F.2d at 566). Finally, the Court held that despite the plaintiff’s failure  
16 to use the word “citizen,” defendant was unable to satisfy its burden of proof and show  
17 that there was diversity.

20 In the instant case, Walmart.com must prove there is diversity between the parties  
21 before removal. While it may have been preferable to use the word “citizen” instead of  
22 “resident,” it is not a shibboleth for pleading a successful in-state class action.  
23 Walmart.com has only asserted that the proposed class might possibly include a non-  
24 citizen of California, this is insufficient to confer federal jurisdiction on this action.  
25 Further, Walmart.com has not and cannot prove that greater than one-third of the class  
26 will be residents of California but not citizens of California.  
27

iii. Plaintiffs Asserted Only California State Law Claims

Unlike the other actions that have been related together in this Court, Plaintiffs here asserted only California state-law claims. Plaintiffs complaints assert four causes of action including violations of California Business and Professions Code §§ 16720 and 16727 (“Cartwright Act”), violation of California Business and Professions Code § 17200 (“Unfair Competition Act”), and unjust enrichment (against Defendant Netflix only). Accordingly, because absolutely no federal claims have been asserted, Walmart.com cannot contend that this Court has federal subject matter jurisdiction.

## V. CONCLUSION

Because Walmart.com has improperly removed this action asserting only state law claims and between parties lacking even minimal diversity, Plaintiffs respectfully request this Court to remand these cases and the related cases to the Superior Court of California in and for the County of Santa Clara.

March 27, 2009

## AUDET & PARTNERS, LLP

/s/ Aaron H. Darsky

William Audet

Aaron Darsky

Adel Nadji

221 Main Street, Suite 1460

San Francisco, CA 94105

Telephone: 415.568.2555

Facsimile: 415.568.2556

1  
2 *Attorneys for Plaintiff James Norem*  
3

4 /s/  
5

6 Mark E. Burton, Jr.  
7 Hersh & Hersh, P.C.  
8 601 Van Ness Ave., Suite 2080  
9 San Francisco, CA 94102-6388  
10 Telephone: 415.441.5544  
11 Facsimile: 415.441.7586  
12

13 *Attorneys for Plaintiff Jim Cornett*  
14

15 /s/  
16

17 Thomas M. Ferlauto  
18 King & Ferlauto, LLP  
19 1880 Century Park East, Suite 820  
20 Los Angeles, CA 90067  
21 Telephone: 310-552-3366  
22 Facsimile: 310.552.3289  
23

24 *Attorneys for Plaintiff Oscar Macias*  
25

26 /s/  
27

28 Gilbert D. Sigala  
Law Offices of Gilbert D. Sigala  
1818 W. Beverly Blvd., Suite 206  
Montebello, CA 90640  
Telephone: 323-726-2150  
Facsimile: 323-726-9183

19 *Attorneys for Plaintiff Jesse Randle*  
20

21 I, Aaron H. Darsky, am the ECF User whose ID and password are being used to file this  
22 MOTION TO REMAND. In compliance with General Order 45, X.B., I hereby attest that  
23 Mark Burton, Jr., Thomas M. Ferlauto, and Gilbert D. Sigala have concurred in this  
24 filing.  
25